

2010

Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause

Donald P. Paradiso

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Law Commons](#)

Recommended Citation

Paradiso, Donald P. (2010) "Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause," *Penn State International Law Review*: Vol. 29: No. 1, Article 13.
Available at: <http://elibrary.law.psu.edu/psilr/vol29/iss1/13>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its Cause

Donald P. Paradiso*

I. INTRODUCTION

“Now and then we had a hope that if we lived and were good, God would permit us to be pirates.”¹ It is doubtful that Mark Twain would have such an impression of the exciting life of a pirate if he actually knew what a modern Somali pirate’s life is like. Somalia has been described as a “black hole in the international community, divorced from the world economy, regional and global institutions, and the rule of law.”² United States President Barack Obama has stated that “[t]he poverty and violence in Somalia breeds the terror of tomorrow.”³ In essence, Somalia is not the place of fairy tale “yo-ho-ho” pirates that the world believes it to be. Mark Twain would be sorely disappointed.

When this Comment was written, the time was 10:01 PM EST on Jan. 2, 2010. As this very line of text was being put to page, Somali pirates were escaping after successfully hijacking the *Asian Glory*, a 20,000-ton UK-flagged chemical tanker sailing in what was supposed to be the International Recommended Transit Corridor, a patrol zone

* J.D. Candidate 2011, The Dickinson School of Law of The Pennsylvania State University. The author would like to specially thank those who supported him during the publishing of this Comment. Special thanks go out to his incredible family, friends, and colleagues, without whom none of this could have been possible.

1. MARK TWAIN, *LIFE ON THE MISSISSIPPI* 32 (1917).

2. International Expert Group on Piracy off the Somali Coast, *Piracy off the Somali Coast: Workshop Commissioned by the Special Representative to the Secretary General of the U.N. to Somalia Ambassador Ahmedou Ould-Abdallah* (Nov. 10-21, 2008) (final report) 6, available at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf [hereinafter *Nairobi Report*].

3. Barack Obama, President of the United States of America, Campaign Speech in Berlin, Germany (July 24, 2008).

through the Gulf of Aden patrolled by international naval forces.⁴ As my colleagues were wincing and the never ceasing “tickity-tack” sound of fingers to keyboard, the twenty-five crewmen of the *Asian Glory* had been taken hostage.⁵ It is possible that many of the crew have families. It is probable that most, if not all of the crewmen, are scared and wondering if they will ever make it home. With any luck, these particular pirates follow the *modus operandi* of most pirates in the region and will merely demand a ransom from Philbox, Ltd., the shipping company that owns the *Asian Glory*.⁶ If this hijacking is anything like the hijacking of the *De Xin Hai*, a Chinese coal-mining ship which a ransom was paid for yesterday, it will be months before the crew see their loved ones again.⁷

In 2009, 196 acts or attempted acts of piracy were committed by these water-borne criminals in the Gulf of Aden, relevant parts of the Red Sea, and directly off the Coast of Somalia.⁸ This Comment will explore the international law governing the act of maritime piracy and test its applicability to the acts that transpire daily in the Gulf of Aden. This Comment also seeks to explain that the international community’s greatest weapon against Somali piracy is to institute the rule of law in an otherwise lawless nation.

II. BACKGROUND

Piracy by its very nature is a low-risk criminal activity that pays well.⁹ Theoretically speaking, it happens for one reason, opportunity,¹⁰ and the Gulf of Aden is awash with it. In terms of oil commerce alone, 2006 saw approximately 3.3 million barrels transported through the Gulf

4. Nick Wadhams and Malcolm Moore, *UK Ship Taken by Somali Pirates was Sailing Without Naval Escort*, TELEGRAPH.CO.UK, Jan. 2, 2010, <http://www.telegraph.co.uk/news/worldnews/piracy/6907457/UK-ship-taken-by-Somali-pirates-was-sailing-without-naval-escort.html> (last visited July 15, 2010); Associated Press, *Somali Pirates Hijack Fourth Vessel in a Week*, CNN.COM, Jan. 2, 2010, <http://www.cnn.com/2010/WORLD/africa/01/02/somalia.hijacking/index.html> (last visited July 15, 2010).

5. See Associated Press, *supra* note 4.

6. See *id.*

7. See *id.* On Jan. 1, 2010 China allegedly paid \$5 million to free the crew of the *De Xin Hai*, a Chinese coal carrier seized off the coast of Seychelles. The ship was taken on Oct. 13, 2009.

8. See International Chamber of Commerce-International Maritime Bureau, *Piracy and Armed Robbery Against Ship Reports* 6 (2009), <http://www.cruiserlog.com/forums/index.php?act=attach&type=post&id=2959> (last visited Feb. 2, 2010) [hereinafter *ICC Reports*].

9. See MARTIN N. MURPHY, *CONTEMPORARY PIRACY AND MARITIME TERRORISM: THE THREAT TO INTERNATIONAL SECURITY* 12 (2007).

10. See *id.*

daily.¹¹ Poverty is generally a precursor to maritime piracy worldwide, however, it is simplistic to cite poverty as the sole reason for the existence of organized maritime piracy.¹² The national Somali literacy rate is approximately one-third of all persons over the age of fifteen.¹³ Thus, an image of a very desperate populace with nearly non-existent economic opportunity outside of illegal activities takes form. Throughout history, piracy has flourished when dominated by organized gangs that have treated it as a business.¹⁴

A. *A History of Maritime Piracy*

Before one can gain an immediate grasp on the development of modern international anti-piracy statutes, one must briefly analyze the historical trends in which maritime piracy has developed. Pirate attacks have been documented since before the erection of the Egyptian pyramids.¹⁵ A milestone in maritime piracy includes Julius Caesar's abduction by, and subsequent campaign against, the Cilician pirates around 77 B.C.¹⁶ The United States also struggled against pirates during the First and Second Barbary Wars in the early 1800s by paying ransoms and then engaging in limited skirmishes.¹⁷ It was during the so-called "golden age of piracy" from about 1650 to 1720 that bore the romanticized stories of "argh-me-hearty" pirates questing for riches and adventure on the Caribbean high seas.¹⁸

Around the same, time European nations widely issued letters of marque to cheaply make war with one another as a form of state-sponsored terrorism.¹⁹ A letter of marque is defined as "a license

11. See United States Department of Energy-Energy Information Administration, Country Analysis Briefs—World Oil Transit Chokepoints, http://www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Full.html (last visited Oct. 15, 2009).

12. See *id.*

13. See United States Central Intelligence Agency, The World Fact Book, Somalia, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Oct. 29, 2009).

14. See John L. Anderson, *Piracy and World History: An Economic Perspective on Maritime Predation*, in BANDITS AT SEA 82, 82-83 (C. Richard Pennell ed. 2001); Maritime Transport Committee, *Security in Maritime Transport: Risk Factors and Economic Impact*, Organization for Economic Co-Operation and Development 13 (2003) available at <http://www.oecd.org/dataoecd/63/13/4375896.pdf>.

15. See ANGUS KONSTAM & ROGER MICHAEL KEAN, *PIRATES—PREDATORS OF THE SEA: AN ILLUSTRATED HISTORY* 32 (2007).

16. See PLUTARCH, *PLUTARCH'S LIVES. VII: DEMOSTHENES AND CICERO, ALEXANDER AND CAESAR*, 445 (Bernadotte Perrin trans., Harvard University Press 1919) (1994).

17. See FRANK LAMBERT, *THE BARBARY WARS* 49-78 (2005) (explaining how the United States first dealt with Barbary pirate attacks by paying tribute).

18. See ANGUS KONSTAM, *PIRATES: 1660-1730* 3 (1998).

19. See Gary M. Anderson & Adam Gifford, Jr., *Privateering and the Private Production of Naval Power*, 11 CATO J. 99, 101 (1991).

authorizing a private citizen to engage in reprisals against citizens or vessels of another nation.”²⁰ When issued to a vessel that would normally be considered to engage in acts of piracy, it created the legal authority to stop, board, search, and, under some circumstances, seize foreign vessels and their cargo.²¹ Therefore, States actually commissioned pirates to harass and attack the merchant vessels of enemy countries.²² Pirates were then viewed as weapons in the arsenal of states.²³

England, France and Spain regularly utilized privateers and letters of marque as weapons in their vast naval arsenals against one another.²⁴ These commissioned pirates, or privateers, were obligated to then promptly present those seized vessels, or “prizes,” to a specialized court, which normally sat in the privateer’s home port, for adjudication.²⁵ One commentator has posited that privateers were regarded by European powers in much the same way as state-sponsored terrorism is viewed today: a dastardly yet efficient way to strike one’s enemy and hide the blade.²⁶ Generally, during times of war a state encouraged acts of piracy against an enemy.²⁷ Then, in times of peace, piracy was deterred.²⁸ This type of double dealing usually resulted in the once-commissioned privateers committing acts of piracy against their former state patrons and others.²⁹

The Declaration of Paris in 1856 placed a moratorium on state-sponsored acts of piracy.³⁰ Signatories to the Declaration of Paris agreed that they would no longer use privateers against one another during war times.³¹ Some scholars claim that the Declaration abolished all forms of piracy, privateering, and state-sponsored terrorism from the European landscape.³² While the Declaration may have memorialized the intent of European nations to ban the use of maritime piracy as a legitimate naval

20. BLACK’S LAW DICTIONARY 757 (8th ed. 2004).

21. See Anderson and Gifford, *supra* note 19, at 101.

22. See Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 12 (2007).

23. See Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 45 (2009).

24. See Douglas R. Burgess, *Hostis Humani Generi, Piracy, Terrorism and A New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293, 307–08 n.6 (2006).

25. See Anderson and Gifford, *supra* note 19, at 101.

26. See ALFRED P. RUBIN, *THE LAW OF PIRACY* 31 (2d ed. 1998).

27. See Azubuike, *supra* note 23, at 45.

28. See *id.*

29. See Burgess, *supra* note 24, at 307.

30. Paris Declaration Respecting Maritime Law, Apr. 16, 1856, 46 bfSP 26, reprinted in DOCUMENTS ON THE LAWS OF WAR 4, 47-49 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

31. See *id.*

32. See Burgess, *supra* note 24, at 314.

weapon, by no means did it solve any of the practical issues associated with making piracy illegal.³³ Ironically, the United States still maintains the right to issue letters of marque,³⁴ and Congressman Ron Paul of the United States House of Representatives recently posited that letters of marque may be used to address the issue of Somali pirates operating in the Gulf of Aden.³⁵

B. Contemporary Piracy

Somali piracy, as a crime-based industry, originated upon the death of General Muhammad Siad Barre's socialist dictatorship in the early 1990s.³⁶ The overthrow was one of the clear beginnings of widespread chaos in the region and has since resulted in descent into a protracted civil war.³⁷ The consequences of the chaos divided the county of Somalia into three politically independent regions.³⁸ In the Northwest lies the breakaway region of Somaliland; the semi-autonomous region of Puntland is in the northeast; and the south is still nominally controlled by the UN-recognized Transitional Federal Government (TFG) but is actually divided amongst several warlord factions.³⁹ With no effective state government to provide even the most basic level of deterrence, piracy has flourished.⁴⁰

Many Somali pirates believe that their acts have roots in fishing disputes.⁴¹ Because there is no effective government operating along Africa's longest state coastline, fishing vessels from Europe and East Asia are exploiting the rich marine resources at the expense of native Somalis.⁴² Some commentators have said that the main source of piracy in the region is comprised of various militias of armed local fisherman in response to unregulated fishing by foreign fishing vessels, which

33. See Azubuike, *supra* note 23, at 46.

34. U.S. CONST. art. I, § 8 provides: "The Congress shall have the power to . . . grant letters of marque and reprisal."

35. See Interview with Ron Paul, Congressman, United States House of Representatives (Apr. 15, 2009).

36. See MARTIN N. MURPHY, *SMALL BOATS, WEAK STATES, DIRTY MONEY: THE CHALLENGE OF PIRACY* 101 (2009).

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.*

41. See generally *Nairobi Report*, *supra* note 2.

42. See Scott Cofen-Smout, *Pirates, Warlords and Rouge Fishing Vessels in Somalia's Unruly Seas*, <http://www.chebucto.ns.ca/~ar120/somalia.html> (last visited Feb. 2, 2010); *US Captures 13 Somali 'Pirates'*, *BBC NEWS.COM*, Mar. 19, 2006, <http://news.bbc.co.uk/2/hi/africa/4822722.stm>.

subsequently become pirate gangs.⁴³ It is no secret that the Somali coast is rich in commercially lucrative marine life.⁴⁴ So much so that it is estimated that EU fishing vessels illegally take out of Somali waters more than five times the value of EU aid to the country every year.⁴⁵ Conservatively, that would equate to approximate €230 million⁴⁶ as of 2009.⁴⁷ Those captured and accused of piracy often cite this issue. The Somalis captured by the US Navy ship *USS Gonzales* in March 2006 apparently claimed to be defending local fisherman by “taxing” illicit foreign trawlers, as did the attackers of the *Dongwon-ho* the following month.⁴⁸

Perhaps something more insidious is afoot in Somalia’s territorial waters. Since the early 1990s, reports have been circulating in Somalia and the international media regarding the dumping of hazardous waste along the coastline of Somalia, including regular sightings of suspected waste containers.⁴⁹ A UN technical fact-finding mission visited the Puntland region of Somalia for five days in May 2005 to investigate allegations of toxic waste unearthed by a 2004 tsunami.⁵⁰ The mission visited three key populated coastal locations at Hafun, Bandarbeyla and Eyl, a region stretching over 500 kilometers in length.⁵¹ The report advised that no traces of toxic waste were found, but the UN added that “the urgent need remained for a more comprehensive assessment of the natural environment of Somalia, which would include further investigations of alleged toxic waste sites on land, and dumping of toxic waste at sea.”⁵² These findings were later called into dispute by a second UN report that declared that containers of toxic waste previously settled

43. See Abdulkadir Khalif, *How Illegal Fishing Deeds Somali Piracy*, THE SOMOLILAND TIMES, Nov. 15 2005, <http://www.somalilandtimes.net/200/08.shtml>.

44. See Nayan Chanda, *No Safe Harbor for Illegal Fishing*, YALEGLOBAL ONLINE, Sept. 15, 2009, <http://www.policyinnovations.org/ideas/innovations/data/000147>.

45. See *id.*

46. Or approximately \$344 million as of November 16, 2009.

47. European Commission of Humanitarian Aid, *Somalia in 2009: Q&A*, http://ec.europa.eu/echo/files/aid/countries/Somalia_QA_Feb09.pdf (last visited Feb. 2, 2010).

48. See Bo-Mi Lim, *Militants Who Seize S. Korea Ship off Somalia Say They're Defending Against Illegal Fishing*, NORTH COUNTY TIMES.COM, Apr. 5 2006, http://www.nctimes.com/news/national/article_488c9c35-c69e-5069-b8b1-388761d65860.html.

49. United Nations Environment Programme, *The State of the Environment in Somalia: A Desk Study*, at p. 33 (2005), available at http://www.unep.org/DEPI/programmes/Somalia_Final.pdf.

50. See *id.*

51. See *id.*

52. *Id.*

on the sea floor were indeed uprooted when the tsunami wreaked havoc on the region.⁵³

Ahmedou Ould-Abdallah, the UN envoy for Somalia, later confirmed that European and Asian companies were, and currently still are, dumping toxic and nuclear waste off the Somali coast.⁵⁴ Ould-Abdallah said "What is most alarming here is that nuclear waste is being dumped. Radioactive uranium waste that is potentially killing Somalis and completely destroying the ocean."⁵⁵ Nick Nuttall, a spokesperson for the UN Environment Programme (UNEP), noted that when the tsunami smashed open barrels of toxic waste off the Somali coast, it exposed a "frightening activity."⁵⁶ Telling of the waste's origin was the discovery of hospital waste and heavy metals commonly used in large-scale industry.⁵⁷ Nuttall echoed the UN's position that a more in-depth analysis of the situation was required, however "because of the high levels of insecurity onshore and off the Somali coast, [UNEP] is unable to carry out an accurate assessment of the extent of the problem."⁵⁸

Therefore, the culmination of these forces has allowed pirates to justify their actions and allowed piracy to become socially acceptable as an industry in Somalia.⁵⁹ In 2009, 287 incidents of both attempted and successful pirate attacks were reported to the International Maritime Bureau (IMB).⁶⁰ Of those 287 incidents, 196 were committed by pirates in the Gulf of Aden, relevant parts of the Red Sea, and directly off the Coast of Somalia.⁶¹

Those attacks, it would seem, show no signs of slowing. For example, on October 2, 2009, a Spanish fishing ship with thirty-six international crewmembers lost contact with the shore after issuing distress calls saying pirates were attacking the ship off the coast of Somalia.⁶² Some sources say that Somali pirates are seizing nearly four

53. See United Nations Environment Programme, *National Rapid Environmental Desk Assessment—Somalia*, (2005) at 134, http://www.unep.org/bh/Publications/Somalia/TSUNAMI_SOMALIA_LAYOUT.pdf (last visited Feb. 2, 2010).

54. Najad Abdullahi, 'Toxic Waste' Behind Somali Piracy, AL JAZEERA.NET, Oct. 11, 2008, <http://english.aljazeera.net/news/africa/2008/10/2008109174223218644.html>.

55. *Id.*

56. *Id.*

57. *See id.*

58. *Id.*

59. *See* MURPHY, *supra* note 36, at 101.

60. *See ICC Reports*, *supra* note 8, at 7.

61. *See id.* at 6.

62. *See* Associated Press, Spanish Ship with 36 Crew Reports Pirate Attack off Somalia, CNN.COM, Oct. 2, 2009, <http://edition.cnn.com/2009/WORLD/africa/10/02/somalia.pirates.spanish.ship/index.html>.

ships a week.⁶³ Piracy has become so audacious that several Somali pirates were captured during an attempted raid on a French warship, the *La Somme*.⁶⁴

III. LEGAL ANALYSIS

The single most controversial aspect of customary international law on maritime piracy is the definition of the term “piracy.”⁶⁵ There is no standard definition for the term.⁶⁶ The Roman Republic can be credited with giving piracy its first legal definition.⁶⁷ Cicero defined pirates as *hostis humani generi*, or enemy of mankind.⁶⁸ The Romans evolved the doctrine into an effective statute further defining pirates:

(a) all . . . crimes which constitute ‘piracy’ [must] occur in areas outside the municipal jurisdictional competence of any nation; (b) the ‘pirate’ is . . . [, consequently,] an enemy of [no individual state but] the [entire] human race; (c) the pirate [must and] should be prosecuted under municipal law . . . after capture, but the right to prosecute is common to all nations and singular to none.⁶⁹

This doctrine later came to be known as universal jurisdiction and has since been reserved for the most egregious violations of international law.⁷⁰ However, modern definitions are quite varied. If there is to be a consensus over how piracy should be internationally prosecuted, the international community must agree to an objective definition of prosecutable conduct.

63. See CNN & Per Nyberg, Somali Pirates Hijack Fourth Vessel in a Week, CNN.COM, Jan. 2, 2010, <http://www.cnn.com/2010/WORLD/africa/01/02/somalia.hijacking/index.html>.

64. See CNN, 5 Held as Confused Pirates Attack French Ship, Oct. 7, 2009, CNN.COM <http://edition.cnn.com/2009/WORLD/africa/10/07/somalia.pirate.attack/index.html>.

65. See Azubuike, *supra* note 23, at 46.

66. See Havina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 A.J.I.L., 269, 272 (1988).

67. See RUBIN, *supra* note 26, at 23.

68. See *id.* at 17 n.61.

69. Burgess, *supra* note 24, at 302 (quoting Barry Dubner, *The Law of International Sea Piracy* (1980)).

70. See M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION 15, 16 (Stephen Macedo ed., 2004.) (“[U]niversal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator. . .”).

A. *Definition of the Term "Maritime Piracy"*

Several writers have defined "maritime piracy" in different ways. For example, nineteenth century expert W.E. Hall posits that pirates are persons who depredate by sea or land without authority from a sovereign.⁷¹ Hall's definition is distinctive in that he removes the place (or *loci*) requirement from the term.⁷² Specifically, he states

Usually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilized power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission might be assumed to be accidental.⁷³

Other commentators have held divergent views. Thomas Joseph has observed that "another mark of a piratical act is that it must be done outside the territorial jurisdiction of any civilized state."⁷⁴ Joseph agrees with Hall's theory that an attack originating at sea but transferred to the shore of a sovereign without any foreign sovereign authority would be classified as an act of piracy. However, Joseph argues that the laws of the attacked nation should be used to prosecute the crime, not the regimes of international law.⁷⁵

Dr. Lawrence Azubuike reasonably states that "a fair measure of agreement would seem to have attended the next important ingredient in the meaning of piracy: piratical acts are done under conditions in which it is impossible or unfair to hold any state responsible for their commission."⁷⁶ As previously stated, letters of marque were used for this precise purpose;⁷⁷ they were used to determine whether a pirate's actions were sponsored by a sovereign nation, an organized political body, a society, or nothing at all. A pirate may also by "the nature of his act . . . [show] an intention or power to reject the authority of that state to which he is properly subject."⁷⁸ It would seem that if there were one

71. See W.E. HALL, TREATISE ON INTERNATIONAL LAW 214-15 (Henry Frowde, ed., Oxford: Clarendon Press 1895) (1880).

72. See *id.*

73. *Id.*

74. THOMAS J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 233 (1905).

75. See *id.*

76. Azubuike, *supra* note 23, at 47.

77. See *id.*

78. HALL, *supra* note 71, at 215.

particularly common element in the definition of piracy, it would be whether the acts of persons appearing to be pirates can be attributable to any sovereign nation.⁷⁹ Therefore, as Dr. Azubuike states, “if one feature should be predominant, or control, in the definition of piracy, it is whether the action of any pirate, or alleged pirate, can legally or fairly be attributable to a state.”⁸⁰ If an “act of piracy” can be attributable to a state, then what exactly does that make the act in the eyes of the international community? It may no longer be piracy.

Other elements of “maritime piracy” include the specific acts pirates must commit for international law to consider the act piracy.⁸¹ Early scholars such as Sir William Blackstone interpreted piracy as “committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there.”⁸² A more contemporary effort to codify the *actus reus* element of piracy was formed by Sir Hersch Lauterpacht,⁸³ a member of the United Nations International Law Commission from 1953 to 1954 and a Judge of the International Court of Justice from 1955 to 1960.⁸⁴ Oppenheim’s *International Law*, edited by Sir Hersch Lauterpacht, stated:

[i]f a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.⁸⁵

The Harvard Research Project also weighed in on the issue. They claimed:

An investigation finds that instead of a single relatively simple problem, there are a series of difficult problems which have occasioned a great diversity of professional opinion. In studying the content of the (definition) article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. There is no authoritative definition. Of the many definitions that have been proposed, most are inaccurate, both

79. *See id.*

80. Azubuike, *supra* note 23, at 47.

81. *See id.*

82. 4 WILLIAM BLACKSTONE, COMMENTARIES *72.

83. *See* Malvina Halberstam, Article, *Terrorism in the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 273 (1988).

84. *See generally* Sir Hersch Lauterpacht, 1897-1960, http://www.lcil.cam.ac.uk/about_the_centre/sir_hersch_lauterpacht.php (last visited Sept. 12, 2010).

85. Halberstam, *supra* note 83, at 273.

as to what they literally include and as to what they omit. Some are impromptu, rough descriptions of a typical piracy.⁸⁶

The United Nations Convention on the Law of the Seas (UNCLOS),⁸⁷ has been understood to require that for an act to be considered piracy *per se*, it must be for private gain.⁸⁸ UNCLOS is one of the prevailing treaty regimes on piracy.⁸⁹

B. Analysis of The United Nations Convention on the Law of the Seas of 1982

UNCLOS is one of the two widely accepted legal regimes of the international law on piracy.⁹⁰ UNCLOS represented a major effort in a long string of attempts by the international community to properly codify a comprehensive convention on the laws against piracy. As early as 1924, the League of Nations attempted to craft an international accord on the matter.⁹¹ They unfortunately failed in their initial endeavors.⁹² Delegates not only felt that the matter of international piracy was not important enough to be directly addressed; they also felt that it would be impossible to reach an international consensus as to what the law should contain.⁹³ Professor Alfred Rubin cites the words of Polish Representative, Minister August Zaleski, on the matter which were approved as part of dismissing the matter on June 13, 1927:

It is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the (proposed) conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain

86. RUBIN, *supra* note 26, at 341.

87. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter *UNCLOS*].

88. See Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?*, in PETER LEHR, (ed.), *VIOLENCE AT SEA* (2006) 160; See also Ethan C. Stiles, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299, 322-25 (2009).

89. See John Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 92 (2008).

90. See generally *UNCLOS*, *supra* note 87. See also John Peppetti, *supra* note 89, at 92.

91. See RUBIN, *supra* note 26, at 333-34.

92. See *id.*

93. See *id.*

Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement.⁹⁴

If the age-old saying "hindsight is always 20/20" needed a real life demonstration, this would be it.

While it is unfortunate that the League of Nations was unable, if merely uninterested, to bring hard and fast rules to prosecute acts of international piracy, the United Nations was more successful when it passed the Convention on the High Seas in 1958.⁹⁵ This Convention served as the basis for the subsequently adopted UNCLOS.⁹⁶ Unlike most treaties, UNCLOS is binding not only on those parties that are signatories, but also on parties that are not.⁹⁷ The definition of piracy contained in UNCLOS has become customary international law, and therefore it is binding on all nations including non-signatories.⁹⁸ UNCLOS also creates various zones, depending on the distance from the coast of a sovereign, which determines the jurisdictional rights of the coastal nation.⁹⁹ Broadly, these are zones are territorial waters, the contiguous zone, the exclusive economic zone and the high seas.¹⁰⁰

The territorial waters of a state are defined as the first twelve miles out to the sea from a state's shoreline.¹⁰¹ The state exercises exclusive jurisdiction over these first twelve miles subject to the right of innocent passage vested in the ships or vessels of other states.¹⁰² The contiguous zone is twenty-four miles from the coastline and twelve miles beyond the territorial waters.¹⁰³ It is in this area that "[T]he coastal State may exercise the control necessary to . . . prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."¹⁰⁴ Additionally, UNCLOS provides that a state can claim

94. *Id.*

95. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312; Peppetti, *supra* note 89, at 91.

96. *See id.*

97. *See* Bahar, *supra* note 22, at 10. ("The United States is not a party to UNCLOS, but it is a party to the 1958 High Seas Convention. Regardless, the definition of piracy contained within both these treaties has become customary international law, binding on all nations, including the United States.")

98. *See id.*

99. *See* UNCLOS, *supra* note 87, arts. 2, 33, 55 & 87. For the purposes of this Comment, the territorial seas include the internal waters of the state, the zone which the UNCLOS defines as the territorial seas, the contiguous zone and the exclusive economic zone.

100. *See id.*

101. *See id.* at art. 3.

102. *See id.* at art. 19.

103. *See id.* at art. 33.

104. *See* UNCLOS, *supra* note 87, at art. 33.

up to 200 miles from its coastlines as its exclusive economic zone.¹⁰⁵ It is important to note here that this entitles the coastal state to “sovereign rights [that allow it] to exclusively exploit the marine resources” within that zone.¹⁰⁶

Any other areas are considered the high seas.¹⁰⁷ The high seas belong to all, and to no one, under the doctrine of the freedom of the high seas.¹⁰⁸ For the present purpose, the significance of this classification is that for an activity to qualify as international piracy under UNCLOS, it must occur on the high seas.¹⁰⁹ The provisions of UNCLOS dealing with piracy span Articles 100 to 107¹¹⁰ and mandate that all states should act to the full extent of their capabilities to contain and prosecute piracy on the high seas.¹¹¹ Article 101 specifically seeks to address and define piracy.

UNCLOS Article 101 defines maritime piracy as:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹¹²

For statistical purposes, the International Maritime Board (IMB) enlarges the scope of the UNCLOS definition to include both actual and

105. See *id.* at art. 57. See also Tammy Sittnick, Comment, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 PAC. RIM L. & POL’Y J. 743, 758 (2005).

106. See Sittnick, *supra* note 105, at 758.

107. See UNCLOS, *supra* note 87, at art. 86.

108. See *id.* at art. 87 (detailing the rights encapsulated in the doctrine of freedom of the high seas); see generally Natalie Klein, Article, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DENV. J. INT’L L. & POL’Y 287, 292-95 (2007).

109. See Azubiuke, *supra* note 23, at 47.

110. See UNCLOS, *supra* note 87, at arts. 100-07.

111. See *id.* at art. 100.

112. *Id.* at art. 101.

attempted attacks whether the ship is berthed, at anchor, or at sea.¹¹³ The International Maritime Organization (IMO) is the United Nations' specialized agency responsible for improving maritime safety by providing a regulatory framework for its member states.¹¹⁴ IMO recently addressed the jurisdictional issue raised by IMB in the Draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.¹¹⁵ IMO lobbied for the creation of a separate crime called "armed robbery against ships" and defined it as "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences."¹¹⁶ The Code of Practice includes both the UNCLOS definition of piracy and the armed-robbery-against-ships addendum.¹¹⁷

C. *Regulatory Gaps in UNCLOS*

The statutory language of UNCLOS is not without large gaps that make applying its provisions very difficult under the circumstances of a failed government, such as in Somalia.¹¹⁸ For example, the language of UNCLOS also implies that the terms "pirate" and "terrorist" are divergent in meaning because the political motives of terrorists are not addressed by the convention.¹¹⁹ Exacerbating this regulatory lacuna is the fact that the only entities allowed to seize pirate vessels under UNCLOS are sovereign states.¹²⁰ As a problematic consequence, Somalia is unable to enforce these policies for itself. Further, states can only seize vessels within their own territorial waters or on the high

113. International Maritime Organization [IMO], Reports on Acts of Piracy and Armed Robbery Against Ships, ¶ 1, U.N. Doc. Ref. T2-MSS/2.11.4.1 MSC.4/Circ.145 (Nov. 10, 2009).

114. International Maritime Organization, About IMO, <http://www.imo.org> (last visited Oct. 11, 2009).

115. International Maritime Organization, Res. A 922 (22), ¶ 2.1, U.N. Doc. A 22/Res.922 (Nov. 29, 2001).

116. *Id.* ¶ 2.2.

117. *See id.*

118. *See* Brooke A. Bornick, Case Comment, *Bounty Hunters and Pirates: Filling in the Gaps of the 1982 U.N. Convention on the Law of the Sea*, 17 FLA. J. INT'L L. 259, 266 (2005).

119. *See* Tina Garmon, Comment, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L. J. 257, 275 (2002); Republic of Bolivia v. Indemnity Mutual Marine Assurance Co., (1909) 1 K.B. 785 (Bolivian rebels were not considered pirates because they acted with a "political," rather than "private" motive when they attacked a Bolivian cargo vessel). *See also* Lawrence J. Kahn, Article, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L. J. 293, 310 (1996).

120. *See UNCLOS, supra* note 87, at arts. 100-07.

seas,¹²¹ which means that a coastal nation cannot pursue pirates through a third-party nation's territorial waters.¹²²

The "private ends" element of piracy, as defined by UNCLOS, precludes politically motivated attacks from being considered acts of piracy.¹²³ Most pirate attacks occur within the territorial waters of a sovereign nation.¹²⁴ When the piratical acts are politically motivated, the coastal sovereign holds exclusive jurisdiction, regardless of whether exercising its jurisdiction is reasonable.¹²⁵ Similarly, the "private ship" element also precludes government-sponsored attacks to be considered acts of piracy.¹²⁶ Government ships have, from time to time, been used to commit acts of piracy and theft,¹²⁷ but UNCLOS excludes government ships from being classified as pirate vessels unless they are under mutiny.¹²⁸ One example occurred in 1995 when *M/V Anna Sierra* was hijacked off the coast of Thailand.¹²⁹ After successfully hijacking the ship, pirates placed the crew in crudely constructed boats and set them adrift.¹³⁰ The pirates then repainted and renamed the ship and sailed it to China, where they were not prosecuted.¹³¹ Not only did China fail to prosecute the pirates; Chinese authorities did not even return the boat to the rightful owners.¹³²

The "high seas" element of piracy precludes maritime violence in territorial waters from being considered acts of piracy.¹³³ Establishing proper jurisdiction among territorial waters is not always straightforward because some coastal nations have shared waters.¹³⁴ One scholar has noted two critical questions arise from this situation. First, are exclusive economic zones part of the coastal nation's territorial waters or high seas? Second, can a state try pirates captured in the territorial waters of another nation?¹³⁵ As will be explained, in the case of Somali pirates, the UN has passed several resolutions in order to shore up the holes in applicable

121. *See id.*

122. *See id.*

123. *See* Bornick, *supra* note 118, at 262.

124. Barry Hart Dubner, Article, *Human Rights and Environmental Disaster—Two Problems that Defy the "Norms" of the International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, 34 (1997).

125. *See* Garmon, *supra* note 119, at 265.

126. *See* Bornick, *supra* note 118, at 262.

127. *The Economist*, *Those in Peril on the Sea*, Aug. 9, 1997, at 40.

128. *See* UNCLOS, *supra* note 87, at art. 102.

129. *See* Dubner, *supra* note 124, at 6-7.

130. *See id.*

131. *See id.*

132. *See id.*

133. *See* Bornick, *supra* note 118, at 263.

134. *See* Dubner, *supra* note 124, at 1.

135. *See* Zou Keyuan, Article, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 115 (2000).

international maritime law. Before these resolutions can be discussed, it is important to analyze the second largest body of maritime law used by the UN.

D. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988: A Moderate Response to the Shortcomings of the UNCLOS

The second of the two widely accepted legal regimes is The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, more commonly known as the Rome Convention.¹³⁶ The Rome Convention was opened for signing in 1988 but it was not actually codified until 1992.¹³⁷ The Rome Convention was particularly different from UNCLOS in that it was specifically dedicated to the broader subject of controlling violence.¹³⁸

Scholars maintain that the primary catalyst for the Rome Convention was “the hijacking, hostage taking, and murder committed on board the Italian-flagged passenger liner *Achille Lauro* [sic] in 1985.”¹³⁹ The Rome Convention thus was made applicable to all acts of violence.¹⁴⁰ It took the tragedy of the *Achille Lauro* to bring the inadequacies of UNCLOS to the attention of international lawmakers.¹⁴¹ Legal authorities quickly realized that UNCLOS was inapplicable to the *Achille Lauro* incident because UNCLOS does not govern a situation in

136. See generally United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 1, 1992, 1678 U.N.T.S. 221 [hereinafter Rome Convention]; see also Michael A. Becker, *International Law of the Sea*, 43 INT’L LAW. 915, 922 (2009).

137. See International Maritime Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988, available at http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686 (lists entry into force as March 1, 1992).

138. See Stiles, *supra* note 88, at 310.

139. James Kraska & Brian Wilson, Article, *The Pirates of the Gulf of Aden: The Coalition is the Strategy*, 45 STAN. J. INT’L L. 243, 282 (2009). The *Achille Lauro*’s story is one of horror and tragedy:

[M]embers of the Palestine Liberation Front overran the *Achille Lauro* and held its twelve American passengers at gunpoint . . . the PLF gunmen did not merely incarcerate the Americans but decided to make an example of one of them. Their choice was a handicapped sixty-nine-year old New Yorker named Leon Klinghoffer, an American Jew. The terrorists pushed Klinghoffer’s wheelchair to the edge of the deck, shot him in the back, and pitched his still twitching body into the sea.

MICHAEL B. OREN, POWER, FAITH, AND FANTASY: AMERICA IN THE MIDDLE EAST: 1776 TO THE PRESENT 556 (2007).

140. See Rome Convention, *supra* note 136, at art. 3.

141. See Helmut Tuerk, Article, *Combating Terrorism at Sea—The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIAMI INT’L & COMP. L. REV. 337, 338-39 (2008).

which criminals, or in this case terrorists, do not utilize an opposing vessel.¹⁴² The plain-language definition of piracy included in UNCLOS only concerns acts committed “by the crew or the passengers of a private ship or a private aircraft.”¹⁴³ This portion of UNCLOS is problematic in tackling hijackings that exclude the use of another ship because the provision requires that the illegal act be for “private ends.”¹⁴⁴ In the case of the *Achille Lauro*, terrorists were not acting towards private ends, but rather towards political ones.¹⁴⁵

The Rome Convention attempted to quell these concerns by removing the “private ends” requirement and expanding the definition of piracy to acts regardless of the involvement of any other vessels.¹⁴⁶ The main offenses outlined by the Rome Convention include: (1) the unlawful and intentional seizure of a ship; and (2) gaining control of a ship by force, threat, or other type of intimidation.¹⁴⁷ Also, the Convention required signatories to legislate domestic law that takes into account the “grave nature” of the offense,¹⁴⁸ and to prosecute or extradite the accused.¹⁴⁹

An argument against harnessing the Rome Convention to combat widespread acts of piracy is that when drafted, the Convention was meant to address acts of terrorism, not piracy.¹⁵⁰ Opponents are correct in their assertion that the Rome Convention was written to combat terrorism. However, the provisions contained therein are directly applicable to the violence that accompanies most modern acts of maritime piracy.¹⁵¹ Importantly, the Convention also applies to the act of hostage taking, which has been a hallmark of Somali piracy to date.¹⁵² The Rome Convention’s definition of piracy includes: (1) any acts or attempted acts of violence committed against a person or ship, seizing control, damaging, or destroying a ship;¹⁵³ and (2) those acts that attach criminal liability for aiding and abetting the aforementioned actions.¹⁵⁴

142. See Niclas Dahlvang, Article, *Thieves Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT’L L. 17, 27 (2006).

143. UNCLOS, *supra* note 87, at art. 101(a).

144. See *id.*

145. See Dahlvang, *supra* note 142, at 27.

146. Rome Convention, *supra* note 136, at art. 3.

147. See *id.* at art. 3(1)(1).

148. *Id.* at art. 5.

149. *Id.* at art. 7(1).

150. See Matthew C. Houghton, *Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy*, 16 TULSA J. OF COMP. AND INT’L L., 253, 274 (2009).

151. See Murphy, *supra* note 88, at 155.

152. See Houghton, *supra* note 150, at 256.

153. See Rome Convention, *supra* note 136, at art. 3.

154. See *id.*

Several other subtle differences exist between the Rome Convention and UNCLOS. While UNCLOS allows universal jurisdiction for any state to seize a ship believed to be engaging in acts of piracy on the high seas,¹⁵⁵ the Rome Convention has not been declared a codification of customary international law and thus only applies to member states with specific connections to the vessel they are seizing.¹⁵⁶ UNCLOS further allows any member state to board a vessel suspected of piracy, so long as that vessel is in either international waters or the territorial waters of the Member State.¹⁵⁷ UNCLOS restricts its discussion of piracy to the high seas, whereas the Rome Convention increases the jurisdictional area to also cover the territorial waters of other states as well.¹⁵⁸ Lastly, the Rome Convention covers ships which travel outside of, and acts that occur within, their own territorial waters.¹⁵⁹ Despite the subtle differences in application of the two Conventions, both unfortunately place large jurisdictional barriers between pirates and the forces seeking to suppress them.¹⁶⁰

E. The United Nations Security Council Resolutions on Combating Somali Piracy

Recently the UN has attempted to remedy the regulatory holes in UNCLOS and the Rome Convention by issuing several resolutions under Chapter VII of the U.N. Charter.¹⁶¹ In June 2008, the Security Council, with permission of the Transitional Federal Government (TFG) of Somalia,¹⁶² allowed states cooperating with Somalia's transitional government to "[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea."¹⁶³ Resolution 1816 also allowed states the right to use "all necessary means" to combat the swelling number of pirate attacks in the region, but it also necessitated advance notice by the assisting nations of such activity to the Security Council.¹⁶⁴ One commentary on the action stated: "In practical terms, the resolution made it lawful for foreign navies to chase pirates into Somali waters and, if necessary, to use force against them."¹⁶⁵

155. See Bahar, *supra* note 22, at 10.

156. See Stiles, *supra* note 88, at 312.

157. See UNCLOS, *supra* note 88, at art. 111.

158. See Stiles, *supra* note 88, at 309-312.

159. See The Rome Convention, *supra* note 136, art. 4.

160. See generally Stiles, *supra* note 88, at 308-312.

161. See Becker, *supra* note 136, at 923.

162. See S.C. Res. 1816, ¶7, U.N. Doc. S/RES/1816 (June 2, 2008).

163. *Id.*

164. *Id.*

165. Becker, *supra* note 136, at 921.

As the chaos in the region continued to mount, the Security Council dropped the notice requirement when it issued Resolution 1838 in October 2008.¹⁶⁶ The Security Council urgently called upon interested states “to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft” to the nation.¹⁶⁷ In December 2008, the Security Council passed Resolution 1846.¹⁶⁸ The resolution reaffirmed the valiant efforts of those states that had already sent forces to the region and, more importantly, authorized states and regional organizations to seize and dispose of “boats, vessels, arms and other related equipment” used for piratical purposes and armed robbery off the coast of Somalia.¹⁶⁹ Resolution 1846 authorized seizures where there is “reasonable ground for suspecting such use.”¹⁷⁰

It would seem, however, that when placed alongside UNCLOS, Resolution 1846 has created more legal questions than answers. First, UNCLOS provides that:

The courts of the State which [carries] out the seizure [of a ship engaged in piracy] may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.¹⁷¹

However, the proper procedures for investigating and prosecuting acts of maritime piracy are not clearly defined.¹⁷² Second, the issue of how to deal with “suspected” pirates in the region, as opposed to those apprehended while in the commission of piracy, remains an unclear and contested point.¹⁷³ The IMO has since requested that the UN Security Council create “clear rules of engagement” for the multinational forces operating in the region.¹⁷⁴ Resolution 1846 authorizes states to suppress piracy on the basis of “reasonable suspicion”¹⁷⁵ which does not provide an answer to IMO’s request. In essence, the resolution serves as an open

166. See S.C. Res. 1838, ¶¶ 2-3, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

167. *Id.*

168. See S.C. Res. 1846, ¶¶ 6 & 9, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

169. *Id.*

170. *Id.*

171. UNCLOS, *supra* note 88, at art. 105.

172. See Becker, *supra* note 136, at 922.

173. Alan Cowell, *Danish Navy Rescues Suspected Pirates*, N.Y. TIMES, Dec. 6, 2008, <http://www.nytimes.com/2008/12/06/world/europe/06pirate.html> (Danish authorities refused to arrest a group of men rescued from a disabled speedboat with weapons onboard).

174. Abdi Sheikh, *Major Shippers Skirt Gulf of Aden to Avoid Pirates*, REUTERS, Nov. 20, 2008, <http://uk.reuters.com/article/idUKTRE4AI5S220081121>.

175. S.C. Res. 1846, *supra* note 168, ¶¶ 6 & 9.

invitation from the UN Security Council for all able nations to enter the territorial waters of Somalia. But the invitation has minimal procedural guidelines.

Lastly, Resolution 1851 opened Somalia's borders to international forces for use in land-based operations.¹⁷⁶ The resolution also finally made special notice of the challenges involved with prosecuting pirates because Somalia currently has no functional justice system.¹⁷⁷ All other regional states have functioning courts of law, trained prosecutors, experienced judges, and adequate legislation.¹⁷⁸ Most of these countries are also parties to some or all relevant international legal instruments, which could be leveraged among the parties in order to broaden cooperation.¹⁷⁹ Further, Resolution 1851 encourages states engaged in the fight against Somali piracy to take onboard their vessels law enforcement officials, or "ship riders," from neighbouring states that will be taking in the majority of captured pirates for prosecution.¹⁸⁰

These resolutions, while progressive, fail to fully address the multitude of causes that transform a common indigent into a machine-gun wielding, hostage-taking pirate. The UN Secretary-General mentioned during the adoption proceedings of Resolution 1851 that:

[e]veryone must be mindful that piracy was a symptom of the state of anarchy that had persisted in Somalia for more than 17 years. Anti-piracy efforts, therefore, must be placed in the context of a comprehensive approach that fostered an inclusive peace process in Somalia and assisted the parties to rebuild security, governance capacity, addressed human rights issues and harnessed economic opportunities throughout the country.¹⁸¹

Part of that comprehensive approach is being mindful that some of the root causes of piracy in the Horn of Africa are illegal dumping, illegal fishing, and a multitude of other human-rights violations.¹⁸² While most of the UN Resolutions on the matter open the door for international naval and militaristic options, Resolution 1851 was the first that actually reminded the community that big guns alone won't be enough to solve

176. See S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

177. See James Kraska & Brian Wilson, *supra* note 139, at 280.

178. See *id.*

179. See *id.*

180. S.C. Res. 1851, *supra* note 176, ¶ 3.

181. United Nations Department of Public Information, *Council Authorizes States to Use Land-Based Operations in Somalia, As Part of Fight Against Piracy Off Coast, Unanimously Adopting Resolution 1851*, Dec. 16, 2008, <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>.

182. See *Nairobi Report*, *supra* note 2, at P 5.4.2.

this problem.¹⁸³ While ultimately a product of the United Nations Security Council, Resolution 1851's recommendations are closely related to those presented in the November 2008 Nairobi Report.¹⁸⁴

F. The Nairobi Report

The Nairobi Report was a product of UN experts who gathered in Kenya to consider new legal and political approaches to combating piracy.¹⁸⁵ Special Representative of the United Nations Secretary General, Ambassador Ahmedou Ould-Abdallah, commissioned the meeting which consisted of experts in virtually all areas of regional government, economics, humanitarian and military efforts.¹⁸⁶ The product of this meeting was the most thorough UN study to date of legal and policy issues associated with Somali piracy.¹⁸⁷ The panel's goal was to determine what measures had already been taken to combat piracy on the local, state and international level, and to determine additional measures that should be taken.¹⁸⁸ As one scholar notes, "[t]he Nairobi Report is recognized as an authoritative and unparalleled source of context, background, and analysis on the problem of maritime piracy in the Horn of Africa."¹⁸⁹

The Nairobi Report recognizes that pirates generally believe that their actions are justified in response to illegal fishing or illegal dumping in Somali waters.¹⁹⁰ However, the Report classifies illegal fishing and dumping in Somalia as secondary issues that would be subsequently curbed by the adoption of other recommendations aimed at thwarting piracy.¹⁹¹ UNCLOS vests sovereign rights in state governments for the purpose of harvesting or conserving resources in their own territorial waters.¹⁹² It is the duty of the governments of coastal states to enforce their fishing laws by such methods as searching vessels, making arrests,

183. See S.C. Res. 1851, *supra* note 176, ¶ 4 ("Encourages all States . . . fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism . . . on all aspects of combating piracy and armed robbery at sea off Somalia's coast.").

184. See Kraska & Wilson, *supra* note 139, at 274.

185. See *Nairobi Report*, *supra* note 2, at 2.

186. See Kraska & Wilson, *supra* note 139, at 277.

187. See *id.* at 277.

188. See *id.* at 274.

189. *Id.*

190. See *Nairobi Report*, *supra* note 2, P 4.

191. See *Nairobi Report*, *supra* note 2, P 3.1.2 ("Poverty, lack of employment, environmental hardship . . . due to drought and illegal fishing and a volatile security and political situation all contribute to the rise and continuance of piracy in Somalia. This situation will remain so until there is . . . action taken against [piracy].")

192. See UNCLOS, *supra* note 88, at art. 56(1)(a).

mandating licenses, or seizing ships if established laws are not complied with.¹⁹³ Again, the obvious question becomes: who can enforce the law?

Likewise, coastal governments have rights regarding illegal dumping. The law of the sea defines “dumping” as “pollution of the marine environment by the deliberate disposal of wastes or other matter from vessels.”¹⁹⁴ Again, the law of the sea places the responsibility on coastal states to adopt laws to manage and control illegal dumping.¹⁹⁵ The law is structured in this manner because then the coastal state is responsible for any failure to comply with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and The London Convention, its 1996 Protocol.¹⁹⁶ Clearly, these laws were not designed to properly function in the case of a failed state such as Somalia.

The most pressing recommendations proposed by the Nairobi Report were those that spoke to resolving the greater problem of economic and social instability in the region.¹⁹⁷ These recommendations, at least in part, aimed to prevent the expert group’s greatest fear from becoming realized: the transformation of the semiautonomous region of Puntland into a pirate state.¹⁹⁸ The report explains that the situation cannot be contained within Somali borders and has become a threat to international stability, peace and security.¹⁹⁹

The report’s recommendations are not groundbreaking or revolutionary, and there is no single “silver bullet” solution. Development of the economy, establishing a rule of law in Somalia, and including Somalia in the political, economic, and security framework of the region are all elementary responses but yet are the forefront recommendations for the long-term success against pirates.²⁰⁰ Some simple tactics that have been proposed include: (1) developing the fishing industry in Somalia;²⁰¹ (2) building up local infrastructure in

193. See *id.* at art. 73.

194. *Id.* at art. 1(1)(5)(a)(i).

195. See *id.* at art. 210.

196. See Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 6 U.S.T. 2403, 1046 U.N.T.S. 120, as amended by 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, 36 I.L.M. 1.

197. See *Nairobi Report*, *supra* note 2, at P 8.2, P 8.3. (The report makes recommendations based on the timeline necessary for their implementation. The noted sections are recommendations that take place over a “medium-term” and “long-term” timeline.).

198. See *id.* at P 8.2.1.

199. See Kraska & Wilson, *supra* note 139, at 274.

200. See *Nairobi Report*, *supra* note 2, at P 8.2.1, P 8.2.2, P 8.2.3.

201. See *id.*, at P 8.2.2.

Somalia coastal communities through labor-intensive job creation;²⁰² (3) providing vocational training for the unemployed youth;²⁰³ (4) supporting pastoralists in the Puntland regions;²⁰⁴ and (5) actually considering Somalia within the priorities of the community of nations,²⁰⁵ as simple yet effective ways of bringing stability to the region.

While the report also calls for the immediate curbing of piracy through “impact” measures, these measures are only effective in the short-term.²⁰⁶ For example, it is imperative to establish a shore-based monitoring system using local communities to look out for boats suspected to be involved in illegal dumping and fishing.²⁰⁷ However, it is also imperative for the international community to understand that piracy will not be suppressed unless the people in coastal population centers are provided with alternative revenue.²⁰⁸ In turn, Somalia must have at least a minimal system of law on which to rely in order for business, trade, and commerce to develop.²⁰⁹

IV. CONCLUSION

“Piracy off the Somali coast is only one manifestation of the tragic events [the] country has experienced for almost 20 years.”²¹⁰ No longer are the effects of crippling poverty and desperation confined within Somali borders; they are spilling over it. The Somali Transitional Federal Government has been recognized as the official government of Somalia since UN Resolution 1816 in June 2008.²¹¹ Thus, if the international community is willing to support the TFG fight pirates off the coast of Somalia, it should also help to stamp out the root causes of piracy by combating Somali poverty. Indeed, developed nations have encouraged the use of big guns and big ships, and made big headlines,²¹² but the true focus of the international effort should be to provide stability on land through a rule of law, rather than to simply monitor every vessel that passes through the Gulf of Aden.

202. *See id.*

203. *See id.*

204. *See id.*

205. *See Nairobi Report, supra* note 2, at P 8.3.

206. *Id.* at P 8.1.

207. *See id.* at P 8.1.2.

208. *See id.* at P 8.2.

209. *See id.*

210. *Nairobi Report, supra* note 2, at 2.

211. *See* S.C. Res. 1816, *supra* note 162, ¶ 2.

212. *See* S.C. Res. 1851, *supra* note 176, ¶ 6 (calling to arms all nations to use force to fight the scourge of piracy off the coast of Somalia).

Frankly, the numbers are staggering. Nearly 20,000 ships pass through the Gulf of Aden annually.²¹³ It is as unreasonable as it is unrealistic to believe that the international naval task force stationed in the Gulf of Aden could hope to safeguard every single vessel. It is also unreasonable to believe that international support will remain indefinitely. For example, the Security Council has authorized an international military presence in the region only until November 28, 2010.²¹⁴ Somalia has been without any rule of law for the past twenty years, and it is unlikely that it will change anytime soon without funding and support from the international community of states.

The course of action is clear. First, international maritime laws must be amended in order to be able to cope with irregular attacks and depredation at sea. The shortcomings and gaps within UNCLOS and the Rome Convention are too large to ignore. Second, no amount of UN Security Council Resolutions will defeat the scourge of piracy without a focused effort. The financial incentive for committing acts of piracy must be deterred, which in turn means that alternative sources of income must be established. Lastly, for any of these outcomes to be realized there must be a rule of law instituted in Somalia. Currently, Kenya has agreed to take in most suspected pirates for trial,²¹⁵ but it is unclear how long this arrangement will last.

In many cases, international maritime law has failed to curb Somali piracy. There is still time to right these wrongs, but time is of the essence. UN Secretary General Ban Ki-moon said that "we must act before it is too late."²¹⁶ For the ten Ukrainians, eight Bulgarians, five Indians and two Romanians taken hostage aboard the *Asian Glory* on January 2, 2010,²¹⁷ it may already be too late.²¹⁸

213. See John W. Miller, *Piracy Spurs Threats to Shipping Costs*, WALL ST. J., Nov. 19, 2008, at A12, available at <http://online.wsj.com/article/SB122701864743437147.html>; *Factbox-The Dangerous Gulf of Aden*, REUTERS, Nov. 3, 2008, <http://www.reuters.com/article/latestCrisis/idUSL3623177>.

214. See S.C. Res. 1897, ¶ 7, U.N. Doc. S/RES/1897 (Nov. 28, 2009)(authorizing military action in cooperation with the TFG for twelve months from the date of the resolution).

215. See S.C. Res. 1851, *supra* note 176, ¶ 2 (thanking Kenya for its support in prosecuting suspected pirates).

216. U.N. Dep't of Public Information, *supra* note 181.

217. See Tristan McConnell, *Somali Pirates Hijack Second British-Flagged Ship*, TIMESONLINE.CO.UK, Jan. 3, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article6974534.ece>.

218. Jean Paul Arouff, *Mauritius Says Ready to Try, Imprison Pirates*, REUTERS, June 12, 2010, <http://www.reuters.com/article/idUSLDE65B021> (last visited Sept. 12, 2010) (Prior to final publishing of this Comment, the *Asian Glory* and her Eastern European crew were released after an unspecified ransom was paid.).